Supreme Court, U.S.
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No. 07-860

78

In the

Supreme Court of the United States

DAVID MICHAEL WOODWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Rule 35(b) motion requires the court to only consider cooperation to reduce the sentence.

2. Whether a Rule 35 motion is protected by the 5th and 6th Amendments where reasons given for limiting the departure were not related to the cooperation and were facts not in evidence or were factually incorrect.

LIST OF ALL PARTIES

Pursuant to Supreme Court Rule 14.1, the undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case. These representations are made so the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of court.

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

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Petitioner respectfully requests that a *writ of certiorari* issue to review the decision rendered by the Fourth Circuit Court of Appeals on August 23, 2007, as well as the Fourth Circuit's Order of September 28, 2007, which denied a rehearing en banc.

The Fourth Circuit has entered a decision in this case that not only squarely conflicts with the United States Constitution and Supreme Court precedent, but also departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power.

In addition, the Fourth Circuit's conclusion that the district court's error was harmless decides an important question of federal law that has not been, but should be, settled by this Honorable Court

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OPINION BELOW

The opinion by the Fourth Circuit Court of Appeals is an unpublished opinion. Reference to the opinion is thereby limited to the following: ***United States v. Woodward***, No. 07-4125, Case Cite: _____ (4th Cir. 2007) (unpublished), *rehearing denied*, No. 07-4125 (4th Cir. September 28, 2007).

The opinion is reproduced in the Appendix attached hereto at A-1. The order denying rehearing is located at A-33.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Fourth Circuit on August 23, 2007, as well as the Fourth Circuit's Order denying a rehearing en banc on September 28, 2007.

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate, as the Fourth Circuit is believed to have entered a decision that is in conflict with the United States Constitution and precedent of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment – "[No State shall] deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

David Michael Woodward and several co-defendants were charged in a 93 count Superseding Indictment in violation of 21 U.S.C. § 846; 21 U.S.C. § 841(a) and (1); 18 U.S.C. § 2; 21 U.S.C. § 843(a)(3); 18 U.S.C. § 1347; 18 U.S.C. § 1956(a); 18. U.S.C. § 1956(h); 21 U.S.C. § 853 and 18 U.S.C. § 982.

Petitioner Woodward was specifically named in Counts 1 through 8, 44, and 46-93. He was accused of violating the Controlled Substances Act governing the manufacture, distribution, and dispensing of controlled substances in the United States. Petitioner was alleged to have distributed, along with his co-defendants, and causing to be distributed, narcotics outside of the course of their medical practice and for other than legitimate medical purposes from on, or about, June 27, 1997 until June, 2001.

The above-referenced charges stem from an investigation by authorities in Myrtle Beach, South Carolina. Petitioner was a medical doctor doing business as Comprehensive Care and Pain Management Center, also known as Carolina Pain and Neurology. The clinic was owned and operated by Petitioner. Insurance coverage was provided by health care benefit programs, including Medicare, which limits insured patients' coverage to medically necessary services.

In 1997 Petitioner came under the investigation of the South Carolina Board of Medical Examiners. Petitioner was charged by the Board with unethical conduct with two patients in that he was accused of inappropriately prescribing specific pain management drugs without medical justification. On October 21, 1997 the Board revoked Woodward's license. Since his license had been revoked, Woodward began searching for another doctor to come into his business. He eventually hired Dr. Michael D. Jackson.

Jackson learned that he was to see patients and prescribe narcotics for pain. However, Dr. Jackson did not complete his examinations, often times not even touching the patients during the examination process. The number of patients visiting the clinic began to grow and more doctors were needed. Other doctors were hired from 1998 to 2001 and, on average; the practice began seeing 3000 to 6000 patients per month, with 95-99% of the patients seeking drugs for legitimate pain management.

Dr. Jackson was promoted to Medical Director of the Clinic. He then introduced Dr.'s Vandergriff, Sutherland, and Bordeaux to the process of "fast tracking."

This was the practice of placing several patients into one room at the same time, usually occurring at the end of the day. These were patients who were visiting only to have their prescriptions renewed, therefore, assistants would write prescriptions and the doctors, who had not even seen the patients, would sign them.

On January 7, 2003, Petitioner entered into a written plea agreement in which he agreed to plead guilty to Counts 1, 49 and 93. One of the stipulations of the plea was that he was to receive consideration for cooperation and the application of U.S.S.G. § 5K1.1 and/or Rule 35 of the Federal Rules of Criminal Procedure. Based on his guilty plea to the aforementioned charges, Petitioner was sentenced on October 7, 2003 to a term of imprisonment of 180 months as to Counts 1, 49 and 93.

The base offense level at sentencing, after objections, to the presentence report and grouping were decided, was Level 39 with a Criminal History Category I. This resulted in a guideline imprisonment range of 260 to 327 months. The statutory maximum on each of the counts was 240 months. At sentencing a 5K1.1 Motion was filed and Petitioner received a sentence of 180 months.

Subsequent to sentencing, a Rule 35 Motion was filed on December 28, 2006 by the federal government for additional post sentencing cooperation. In that Motion, a substantial amount of the post-sentence cooperation that had been provided by Petitioner was identified. Based on this Motion the government determined additional sentencing mitigation consideration should be given the Petitioner in relationship to the 180 month sentence originally imposed.

On January 16, 2007 the District Court granted the Motion and reduced the sentence by only 24 months based on incorrect information not related to the cooperation.

A timely Notice of Appeal on the Rule 35 decision was filed by Petitioner on January 22, 2007 in accordance with Fed. R. App. Proc. 4(b). Jurisdiction in the Fourth Circuit Court of Appeals was proper pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

Petitioner's appellate brief set forth two issues for review by the Fourth Circuit. The first argument being that the district court abused its discretion by using factually incorrect evidence, and information

that was outside the scope of Petitioner's cooperation, resulting in a sentence reduction less than that which was reasonable based upon the government's Rule 35 motion. The second argument being that a defendant who cooperates and does not appeal his sentence, but receives a Rule 35(b) motion, after his co-defendants received substantial sentence reductions because of *Booker*, should be given similar sentencing consideration at the Rule 35 hearing to balance the effect of the resulting co-defendant disparity in violation of 18 U.S.C. § 3553(6).

After considering the argument presented in Petitioner's brief, a panel for the Fourth Circuit issued its Opinion dated August 23, 2007. In said Opinion, the panel determined that although the district court failed to explain the steps by which the sentence was reduced, they were still satisfied that any misstatement made by the District Court did not establish that the court's ruling on the Rule 35 motion constituted a sentence in violation of law. In regard to the second issue, the panel agreed with Petitioner that the District Court may consider only the defendant's assistance in deciding how far it will depart downward to reward the defendant, but decided that district court did not abuse its discretion or impose a sentence in violation of law by referring to factors other than Woodward's assistance to explain the extent of its departure. The panel, accordingly, denied all of the issues raised on appeal and affirmed the district court.

Petitioner then sought an en banc review of the panel's decision. In the Petition for En Banc Review, Petitioner specifically challenged the panel's

finding which allows for the admission of evidence of outside factors already considered when determining the extent of a Rule 35 departure, as well as the panel's failure to resolve whether a district court errs in assuming facts not in evidence when attempting to determine the starting and limiting points for departure pursuant to Federal Rule of Criminal Procedure 35. The Fourth Circuit denied the request for en banc review on September 28, 2007.

As this Petition for Writ of Certiorari is timely submitted, the issues herein are properly before this Honorable Court and should be heard as this case departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. WHETHER A RULE 35(B) MOTION REQUIRES THE COURT TO ONLY CONSIDER COOPERATION TO REDUCE THE SENTENCE.

Petitioner Woodward argued to the United States Court of Appeals for the Fourth Circuit that the district court erred when it considered factors apart from his cooperation in deciding to give a lesser departure than it did at his first sentencing. There is a split among the Circuit Courts with regard to this issue.

In United States v. Pearce, 191 F.3d 488, 494 (4th Cir. 1999), the Fourth Circuit held that the district court may consider only the defendant's assistance in deciding how far it will depart downward when rewarding a defendant. The Court held that factors such as the defendant's prior criminal history, prior drug use and abilities as a parent were irrelevant when determining whether the defendant was eligible for a downward departure for assisting the government in the prosecution of other cases. Pearce, 191 F.3d at 494-495. Using the District Courts reasoning in Woodward the Fourth Circuits denial of his appeal is contrary to Fourth Circuit precedent.

In United States v. Chavarria-Herrara, 15 F.3d 1033 (11th Cir. 1994), the Eleventh Circuit held that since the district court relied on factors other than the substantial assistance of the defendant, the reduced sentence was imposed in violation of the law pursuant to 18 U.S.C. § 3742(f). As a result, the Circuit Court vacated the sentence and remanded the case to the district court for further sentencing proceedings.

Furthermore, these holdings are both in accord with § 5K1.1 of the United States Sentencing Guidelines which states that the appropriate reduction must be determined by the court for articulated reasons that may include "(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the

defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and (5) the timeliness of the defendant's assistance."

Other Circuit Courts, however, have rendered decisions to the contrary. In United States v. Neary, 183 F.3d 1196 (10th Cir. 1999), the United States Court of Appeals for the Tenth Circuit held that Rule 35(b) does not prohibit consideration of factors other than the defendant's assistance in deciding to what extent a defendant's sentence should be reduced. In Neary, the Court held that the district court was well within its right to examine the defendant's role in the offense for which she had been convicted. Id.

In United States v. Doe, 351 F.3d 929, 932-933 (9th Cir. 2003), the United States Court of Appeals for the Ninth Circuit held that nothing in the text of Rule 35(b) purports to limit what factors may militate against granting a Rule 35(b) reduction. In Doe, the Circuit Court found that weighing such factors as the nature of the cocaine importation conspiracy to which Doe pled guilty; the extent and duration of his participation in the drug cartel; the massive amount of cocaine he was importing; and the sentencing reductions the court had already awarded were all properly considered during the Rule 35 hearing.

In Petitioner's case, the Fourth Circuit found that the district court did not err when it considered factors, outside of Petitioner's assistance to the federal government, during the Rule 35 hearing. In making its decision, the panel almost summarily dismissed well settled case law from its own Circuit.

Under its own holding in Pearce the Circuit Court should have found that the district court may consider only the defendant's assistance in deciding how far it will depart downward when rewarding a defendant. 191 F.3d at 494-495. Instead, the District Court considered factors such as Petitioner's involvement in the criminal enterprise, the previous success level of those that he employed, and the loss of medical licenses by those that Petitioner employed among other incorrect statements. One such statement was a prediction, based on no evidence, that the Petitioner would engage in similar criminal conduct in the future. This would be illogical and unsupported in light of the extent of the Petitioner's cooperation.

Under the Fourth Circuit's holding in Pearce, decided only eight years ago, this and other non cooperation information should never have been used by the District Court. These factors were in no way related to the assistance that Petitioner provided to the federal government during the many cases that he helped them to not only prosecute, but to attain convictions as well. A more detailed listing of the errors follows. This court has remanded many cases that represent decisions contrary to the circuit precedent. More importantly this Honorable court should review what standards apply under the constitution when incorrect information is used to determine a limited departure for cooperation as applied to Rule 35(b) of the Federal Rules of Criminal Procedure.

This court has never considered whether any limiting factor for a Rule 35(b) departure, when based on new evidence or factually inaccurate

evidence, is protected under the 5th and 6th Amendment and require due process protection in order to permit a defendant to challenge such information.

II. WHETHER A RULE 35 MOTION IS PROTECTED BY THE 5TH AND 6TH AMENDMENTS WHERE REASONS GIVEN FOR LIMITING THE DEPARTURE WERE NOT RELATED TO THE COOPERATION AND WERE FACTS NOT IN EVIDENCE OR WERE FACTUALLY INCORRECT.

The court, on motion of the Government made within one year after the imposition of a sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense. Fed. Rule Crim. Proc. 35(b).

Here, after he was sentenced by the district court, Petitioner continued to provide substantial assistance to the federal government with the continued prosecution of his co-defendants and the prosecution of other interrelated and unrelated cases. Petitioner was able to provide additional information, not previously known by the government, which only became available during his post-sentencing cooperation. The information provided by Petitioner proved to be truthful, complete, reliable, and resulted in numerous convictions for the government in both State and Federal Courts. Furthermore, the assistance provided by Petitioner also placed him and his family in serious danger in the form of threats

against their safety. Moreover, while incarcerated in county jails, awaiting his opportunity to testify, Petitioner suffered medical injuries as a result of not being provided with proper medical treatment.

The extent of Petitioner's cooperation and assistance, in the words of the federal government, was "substantial." Clearly this assistance, when combined with the additional factors discussed above, warranted a sentence equal to those of the substantially reduced sentences of the co-defendants who never cooperated and were convicted at trial due to Petitioner's cooperation and assistance. This was not the case, however.

During Petitioner's Rule 35 hearing, the following statement was made by the Court:

> " . . . in our previous departure downward, we started with a sentence of 720 months, 60 years, and reduced that sentence to 160 months which is 15 years." [Sealed Hearing Transcript (hereinafter "HT") 21]. " . . . The 60 year sentence was, obviously, unrealistic even though it was, at the time, dictated by the guidelines. We thought the sentence of 180 months was more realistic. But I think all of you who have dealt with me before, in departures downward, I give a large departure downward the first time around . . ." [HT:21].

Petitioner's sentencing guidelines were never 720 months either in the presentence report or the court's own finding's at the original sentencing hearing. Therefore, the court's first error came in incorrectly stating the record in terms of where the 5K1.1 departure started from and why the Rule 35 reduction should be limited.

At the Rule 35 hearing the court misstated the Rule 35 departure issue by suggesting it is more limited after a defendant receives a 5k1.1 departure at sentencing:

> " . . . and I think that departure downward (pursuant to U.S.S.G. 5K1.1) gets us in the realistic range and out of the sometimes guideline unrealistic range. And any departures downward thereafter are not nearly as substantial. And I think that's going to be the case here . . . Generally, we look at co-defendant's and we look at what they are facing and what they have received by way of departures downward. In trying to be consistent therewith, the same may be expected here; but I think, however, that some reason for such apparently inconsistent treatment should be stated for the record." [HT:21].

The court went on to state the following factually incorrect information in violation of Rule 35(b):

" . . . I, frankly, feel that Dr. Woodward's involvement in this matter was entirely different from those of his co-defendants. He was the one that started this entire criminal endeavor. He was the one who put it together and made it work. He brought the others in . . . It's obvious to me that none of these others are capable of doing what Doctor Woodward did nor, in my judgment, are they threats to do that. They were down on their luck, if you please. They were certainly not the most successful doctors around. He picked them up, put them down there, put them on their feet and gave them a way to make money.

. . . I don't think we have to worry about those defendants. And I speak of the other doctors that were involved and the other personnel that were involved committing similar crimes . . . and for that reason, I have concluded in their cases that they should not be incarcerated for long periods of time. I have concluded in their cases that they lost their licenses, and they've been punished, that they do not have the wherewithal to write prescriptions for illegal drugs anymore nor is it likely that they will ever . . . In the case of Dr. Woodward, I suspect strongly that, if I were to release him today, he would start another clinic such as the one in Myrtle Beach in short order. He is capable of doing that

and I believe he is at risk to do that." [HT:21-22].

Contrary to the statements made by the court, there was absolutely no evidence that Petitioner ever hired "down on their luck" doctors. Moreover, with respect to role differentials by each of the defendants, Petitioner received a four (4) point role enhancement at the time his original sentence was imposed. This enhancement takes into account any level of difference in Petitioner's involvement versus the involvement of his co-defendant's.

The district court further misstated the facts of Petitioner's situation. During the duration of the criminal endeavor it was Petitioner's co-defendants who wrote prescriptions, not Petitioner. Similar to his co-defendants, Petitioner will also never be able to write prescriptions in the future because he too lost his license. Additionally, the District Court's reasoning for the unreasonable level of departure in the co-defendant's cases gives no indication that any of the doctors who worked at the clinic were down on their luck, were not previously successful, or incapable of making money on their own. Moreover, there was also no evidence placed into the record by anyone, including the government, that Petitioner, upon his release, would commit a similar crime or, for that matter, any crime at all. These inconsistent and incorrect references place the basis of the courts decision into an erroneous realm of inaccurate, incomplete, untrue beliefs.

In rendering its decision during the Rule 35 hearing, the Court committed the following factual errors:

1. The court stated as an erroneous basis for limiting the Rule 35 departure that the downward departure at the original sentencing was from 720 months to 180 months. There was never any 720-month sentence to be imposed. This was not the guideline range. The actual guidelines were 260 to 327 months with 240 as the statutory maximum on each count, which were grouped;

2. The court was incorrect in stating the reasons for the difference between Petitioner, who cooperated, and the co-defendants who did not cooperate, instead deciding to go to trial. The differences are articulated by the government's appeal against the reduction of the sentences from the substantial guideline ranges and sentences the co-defendants were exposed to. The downward departures the co-defendants received were approximately 80-90 percent less than their original sentences. (Co-defendant Government Appeal Number 06-4435(L));

3. The court misstated the record as to the fact that these doctors were "not the most successful doctors around" or were "down on their luck." There is no evidence that these doctors were either down on their luck, or unsuccessful. [HT:22]. The co-defendants knowledge of medicine contributed to their illegal conduct, which included directing the activities of the clinic;

4. There is no difference between the co-defendant's losses of their licenses and Petitioner's, including their collective inability to write prescriptions. [HT:22];

5. The District Court failed to give substantial weight to the government's evaluation of Petitioner's cooperation;

6. The District Court granted a completely unreasonable sentence departure on the Rule 35 relative to the extent of Petitioner's cooperation;

7. The District Court discounted the extent of the departure for the Rule 35 simply because Petitioner was granted an earlier departure under § 5K1.1 for different cooperation; and

8. The District Court violated the spirit of the contract Petitioner held with the government by grossly denying the departure credit that Petitioner had earned.

9. The District Court concluded, without any evidence to support such a conclusion, that Petitioner would commit a similar type of crime upon his release.

Never before has this Honorable Court decided how such an issue should be addressed. Never before has an issue, such as this, been raised on appeal before this Court. However, in Almendarez-Torres v. United States, 523 U.S. 224, 251 (1998), this Court held that due process

protections extend, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." Almendarez-Torres objected to the introduction of previous convictions during the sentencing phase of his trial because such evidence was not presented during his jury trial. This Court held that sentencing Almendarez-Torres to a higher term was acceptable because of (1) the certainty that procedural safeguards had attached to any fact of prior conviction, and (2) the reality that Almendarez-Torres did not challenge the accuracy of that fact in his case mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a fact which lead to an increased punishment.

Here, there were no "procedural safeguards" which attached to any of the erroneous factors enumerated by the trial court so as to ensure the accuracy with which they were presented. In fact it appears, from the record on appeal, that the trial court made conclusions of fact, with no basis in evidence and then used those erroneous conclusions to penalize Petitioner during the Rule 35 hearing. Furthermore, unlike the defendant in Almendarez-Torres, here Petitioner challenged the accuracy of the "facts" introduced by the trial court. Petitioner recognized the inaccuracy in each of the previously enumerated "facts" and lodged an appeal against their use.

In Apprendi v. United States, 530 U.S. 466, 483-484 (2000), this Court held that a judge's role in sentencing is constrained at its outer limits by facts alleged in an indictment and found by a jury. In that case this Court held that a New Jersey hate

crime statute which authorized an increase in the maximum prison sentence allowed based solely upon a judge's finding that the defendant acted with the purpose to intimidate a victim, based upon particular characteristics of the victim, violated the due process clause. This Court further held that it is unconstitutional for a state legislature to remove from the jury the assessment of facts, which may ultimately increase the prescribed range of penalties to which the criminal defendant is exposed. Id. at 490-491.

Here, in determining not to award Petitioner with a Rule 35 downward departure, and thereby sentencing him to a much harsher sentence than his co-defendants, the district court considered and weighed evidence that was factually incorrect, not alleged in the indictment, and not found by a jury. The district court accused Petitioner of hiring "down on their luck doctors" who were "not the most successful around." The Court alleged that Petitioner would reopen his business if given another chance. The Court indicated that the co-defendants would lose their licenses, even though Petitioner lost his as well. No information had ever been presented supporting these accusations and Petitioner could not respond to them without the availability of due process protection.

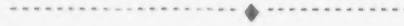
As a result of the district court's reliance on this erroneous information, Petitioner's Rule 35 departure was limited to only 24 months. Furthermore, Petitioner received a sentence much harsher than that of his co-defendant's, even though he was the one who testified against them and he was the one who made the federal government

aware of other criminal enterprises. On resentencing, even though the many co-defendants went to trial and were subject to 10 and 20 years in prison, they received 6 months to 3 years based on downward departures similar to Petitioner's. The gross disparity caused by using incorrect information violates the Petitioner's due process rights.

This Honorable Court is being called upon to decide what should happen in a situation such as this. Even though a judge, admittedly, has sole discretion in awarding a Rule 35 downward departure to a defendant that provides substantial assistance to the federal government, what happens if that judge limits the relief because of his reliance upon incorrect or erroneous information?

Petitioner believes that in such a situation the district courts decision must be revisited and the Rule 35 hearing should be reheard with correct facts and evidence considered and Petitioner having the opportunity to defend himself from false accusations. Such is mandated by the 5th and 6th Amendments to the United States Constitution.

This Honorable Court is being asked to address the question of what Rule 35(b) requires to make a determination of a reduction in the sentence. There is a Circuit conflict on whether the court can use anything but cooperation to reduce the sentence and if they can must that information be subject to constitutional safeguards.



CONCLUSION

WHEREFORE, Petitioner prays this Honorable Court will grant the present request, and grant the Writ of Certiorari.

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Sealed Appendix Documents:

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 07-4125

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DAVID MICHAEL WOODWARD,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. C. Weston Houck, Senior District Judge. (4:02-cr-00673-CWH-1)

Submitted: August 3, 2007
Decided: August 23, 2007
[Entered: August 23, 2007]

Before NIEMEYER, MICHAEL, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Marcia G. Shein, LAW OFFICES OF MARCIA G. SHEIN, P.C., Decatur, Georgia, for Appellant. William B. Day, Winston D. Holliday, Jr., Assistant United States Attorneys, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

David Michael Woodward appeals the district court's order granting the government's Fed. R. Crim. P. 35(b) motion to reduce his sentence. Woodward argues, first, that the district court abused its discretion in determining the extent of the departure by considering incorrect information and matters apart from his cooperation and, second, that he should have received a more substantial departure to offset the benefit his co-defendants received from United States v. Booker, 543 U.S. 220 (2005) We affirm.

Woodward pled guilty in 2003 to conspiracy to possess oxycodone with intent to distribute, health care fraud, and money laundering, offenses which arose from his medical practice as owner and operator of a pain management center in Myrtle Beach, South Carolina. He subsequently testified at the trial of several doctors who were his former employees. At his first sentencing hearing, the district court accepted the parties' stipulation as to the drug amount for which Woodward was accountable over the greater amount recommended by the probation officer, and also reduced an adjustment for vulnerable victims under U.S.

Sentencing Guidelines Manual § 3A1.1(b) (2002) from four levels to two levels. These changes reduced the total offense level from 43 to 39 and reduced the advisory guideline range from life imprisonment* to 262-327 months. The court then granted the government's motion for a substantial assistance departure under U.S. Sentencing Guidelines Manual § 51(1.1, p.s. (2002), and imposed a sentence of 180 months imprisonment.

In 2006, the government filed a Rule 35b) motion for reduction of sentence based on additional assistance Woodward had provided since his sentencing. At a hearing in January 2007, the district court granted the government's motion, departed downward by an additional twenty-four months, and imposed a sentence of 156 months. The court stated that, "[un our previous departure downward, we started with the sentence of 720 months, 60 years, and reduced that sentence to 180 months, which is 15 years." The court stated that its practice was to "give a large departure downward the first time around . . . [a]nd any departures downward thereafter are not nearly as substantial." The court further stated:

> Generally, we look at co-defendants and we look at what they are facing and what they have received by way of departures downward. In trying to be consistent therewith, the

---

* Because each count carried a statutory maximum of 240 months, pursuant to USSG § SG1 .2 (d), the guideline range became consecutive sentences of 240 months for each count, or 720 months.

same may be expected here; but I don't think the same treatment is warranted. I do think, however, that some reason for such apparently inconsistent treatment should be stated for the record.

I, frankly, feel that Doctor Woodward's involvement in this matter was entirely different from those of his co-defendants. He was the one that started this entire criminal endeavor. He was the one that put it together and made it work. He brought the others in.

It's obvious to me that none of these others are capable of doing what Doctor Woodward did nor, in my judgment, are they threats to do that. They were down on their luck, if you please. They were certainly not the most successful doctors around. He picked them, put them down there, put them on their feet and gave them a way to make money.

I don't think that we have to worry about those defendants. And I speak of the other doctors that were involved and the other personnel that were involved committing similar crimes.

And for that reason, I have concluded in their cases that they should not be incarcerated for long

> periods of time. I have concluded in their cases that they do not have the wherewithal to write prescriptions for illegal drugs anymore not is it likely that they ever will.
>
> In the case of Dr. Woodward, I suspect strongly that, if I were to release him today, he would start another clinic such as the one in Myrtle Beach in short order. He's capable of doing that, and I believe that he is at risk [to] do that.

In this appeal, the first issue is the appealability of the district court's order granting the Rule 35W) motion. "[A]ppeals from rulings on Rule 35(b) motions are governed by 18 U.S.C. § 3742 [2000] . . . ." United States v. Hartwell, 448 F.3d 707, 712 (4th Cir. 2006) (citing United States v. Pridgen, 64 F.3d 147, 149 (4th Cir. 1995)) . We lack "jurisdiction to review the extent of the district court's downward departure, except in instances in which the departure decision resulted in a sentence imposed in violation of law or resulted from an incorrectapplication of the Guidelines." United States v. Hill, 70 F.3d 321, 324 (4th Cir. 1995) . However, if a defendant "alleg[es] that his otherwise final sentence was imposed in violation of law he may make that claim in appealing a ruling on a Rule 35(b) motion." Hartwell, 448 F.3d at 713.

Woodward's claim that the district court considered incorrect information and erred in considering information other than his cooperation amounts to a claim that he was sentenced in

violation of law. Therefore, we have jurisdiction over his appeal.

Woodward first alleges that the district court erroneously stated that his guideline range was initially 720 months, and thus the court "misstated the record in terms of where the § 51(1.1 departure started from and why the Rule 35 reduction should be limited." While Woodward is correct in saying that the district court did not begin its departure at 720 months, it is not clear from the record that the court meant to say that it departed from 720 months to 180 months. Rather, it appears that the court stated correctly that, at the first sentencing hearing, Woodward's sentence was reduced overall from 720 months to 180 months. Although the court failed to explain the steps by which the sentence was reduced, we are satisfied that any misstatement does not establish that the court's ruling on the Rule 35 motion constituted a sentence in violation of law.

Woodward also asserts that the court abused its discretion by making an unsupported distinction between him and his co-defendants, thus "creating unwarranted co-defendant disparity ... Having heard the trial evidence, the court assessed Woodward's culpability relative to his co-defendants differently than Woodward would have liked, but Woodward has not established that the court relied on incorrect information. In a related claim, Woodward contends that the court erred when it considered factors apart from his assistance in deciding to give a lesser departure than it did at the first sentencing. While we have held that the district court may consider only the defendant's assistance in deciding how far it will depart downward to

reward the defendant, United States v. Pearce, 191 F.3d 488, 492 (4th Cir. 1999) , several circuits have held the court may consider other factors in limiting the extent of the departure. United States v. Neary, 183 F.3d 1196, 1198 (10th Cir. 1999) ; United States v. Manella, 86 F.3d 201, 203-05 (11th Cir. 1996) ; United States v. Chavarria-Herrara, 15 F.3d 1033, 1037 (11th Cir. 1994) . Thus, the sentencing court may not grant a substantial assistance departure or augment such a departure based on factors other than assistance, but it may consider other factors to limit the departure. United States v. Doe, 351 F.3d 929, 932-33 (9th Cir. 2003)

In light of these authorities, we conclude that the district court did not abuse its discretion or impose sentence in violation of law by referring to factors other than Woodward's assistance to explain the extent of its departure. Moreover, under Pearce, Woodward's claim that he should have received a greater departure to give him a benefit from Booker is without merit.

We therefore affirm the sentence imposed by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
District of South Carolina

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

UNITED STATES OF AMERICA
vs.
DAVID MICHAEL WOODWARD

Case Number: 4:02CR00673-CWH

US Marshall's Number: 40469-018
Peter D. Protopapas and Marcia G. Shein, Retained
Defendant's Attorney

Date of Original Judgment: Dec. 16. 2003
[Entered January 18, 2007]

Reason for Amendment:
Reduced Sentence Purusant to Fed. R. Crim. P. 35(b)

THE DEFENDANT:
pleaded guilty to counts one (1), 49 and 93 of the superseding indictment on 1/7/03.

Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:
Title and Section
21:846
Nature of Offense
Please see indictment

Date Offense Concluded
June 2001
Count Numbers
1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Counts 2, 3, 4, 5, 6, 7. 8, 44, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82. 83, 84, 85, 86, 87, 88. 89, 90, 91, 92 of the superseding indictment and Counts 1, 2, 3, 4, 5, 6, 7, 8, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58 of the indictment are dismissed on the motion of the united states.

IT IS ORDERED that the defendant shall notify the United States Attorney for t his district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court or United States attorney of any material change in the defendant's economic circumstances.

January 16, 2007
Date of Imposition of Judgment

/s/ C. Weston Houck
Signature of Judicition Officer
HON C. WESTON HOUCK

SENIOR U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

JANUARY 18, 2007
Dated

IMPRISONMENT

The defendant is hereby committed to the custody of the United Sates Bureau of Prisons to be imprisoned for a total term of one hundred eighty (180) months. This term consists of 180 months as to each of Counts 1, 49 and 93, all terms shall run concurrent.

This matter came before the Court on the government's Rule 35(b) motion and the Court having granted the same,

IT IS ORDERED that the above term of imprisonment is reduced to one hundred fifty-six (156) months. This term consists of 156 months as to each of Counts 1, 49 and 93, all such terms shall run concurrent. All other provisions of the sentence imposed on September 22, 2003 and as amended pursuant to Order of December 5, 2003 remain as imposed.

The defendant is remanded to the custody of the United States Marshall.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall bean supervised release for a term of three (3) years.. This term consists of three (3) years as to each of counts 1, 49 and 93; all such terms shall run concurrently.

While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision outlined in Title 18 U.S.C. § 3583(d) and the following special conditions:

1. The defendant shall participate in a program of drug testing and treatment, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.

2. The Court reserves the right to increase/decrease restitution payments based upon any increase/decrease in income. At the direction of the U.S. Probation Office, the defendant shall provide financial statements as requested so the Court may be fully aware of the defendant's financial status. The Court recognizes the defendant may not make full restitution prior to expiration of supervision; however, he is to make some effort toward restitution.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

□ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

□ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement

CRIMINAL MONETARY PENALTIES

The defendant will make all checks and money orders payable to the "Clerk" U.S. District Court" unless otherwise directed by the court.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet *5*, Part H.

Totals:

Assessment	$300.00
Fine	_____
Restitution:	$ 674,512.06

☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case* will be entered after such determination.

■ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(8), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee *Total Amount of Loss

Amount of Restitution Ordered | Priority Orer of Percentage of Payment

SEE *VICTIMS LIST* OF VICTIMS (PAGE 5). $674,512.06

■ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

■ The interest requirement is waived for the __ fine and/or ■ restitution.

* Findings for the total amount of losses are required under Chapters 109a, 110, 110a, AND 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

RESTITUTION PAYEES

No.	Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered
1	Department of Health and Human Services, Health Care Financing Administration/ CMS, Division of Accounting	$377,314.55	$377,314.55
2	S. C. Department of Health & Human Services Division of Program Integrity Attn: Julie Cook	$225,168.75	$225,168.75
3	Blue Cross-Blue Shield, Corporate Audit Division, c/o Berwyn Brown	$66,488.27	$66,488.27
4	TRICARE c/o Audrey Duvall	$5,540.49	*$5,540.49*
	TOTAL	$674,512.06	$674,512.06

SCHEDULE OF PAYMENTS

Payment of the total criminal monetary penalties shall be due as follows:

A ■ Lump sum payment of $300.00 (special assessment) and *$674,512.06* (restitution) due immediately, balance due

__ not later than,

__ or in accordance with __ C, ■ D, or __ E below; or

B __ Payments to begin immediately (may be combined with C, D, OR E below); or

C __ Payments in (e.g., equal, weekly, monthly, quarterly) installments of~ over a period of(e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ■ Any remaining restitution payments in monthly installments of not less than $500.00 to commence 30 days after release from imprisonment to a term of supervision; or

E __ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Innate Financial Responsibility Program, are made to the clerk of

court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court cost(s):

■ The defendant shall forfeit the defendant's interest in property as directed in the Preliminary Order of Forfeiture, filed September 22, 2003 and the said order is incorporated herein as part of this judgment:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

CRIMINAL N O.: 4:02-673

UNITED STATES OF AMERICA	)
	)
v.	)
	)
DAVID MICHAEL WOODWARD, ET AL.	)

[Entered September 22, 2003]

PRELIMINARY ORDER OF FORFEITURE AND JUDGMENT AS TO DAVID MICHAEL WOODWARD

1. On August 28, 2002, a Federal Grand Jury in the District of South Carolina returned a Superseding Indictment in which the Defendant, DAVID MICHAEL WOODWARD, was charged with the following offenses:

21 U.S.C. § 846:
Conspiracy to unlawfully distribute and dispense Schedule II, Schedule III, and Schedule IVC controlled substances resulting in death and serious injury from the u se of the Schedule II controlled substances (Count 1);

21 U.S.C. § 841(a)(1)
18 U.S.C. § 2
Distribution and dispensing of Oxycodone, a Schedule II Controlled Substance, outside the usual course of medical practice and for other than the legitimate medical purposes; Aiding and abetting (Counts 2-8);

21 U.S.C. § 841(a)(1)
18 U.S.C. § 2
Distribution and dispensing of Hydrocodone, a Schedule III controlled substance, outside the usual course of medical practice and for other than legitimate medical purposes; Aiding and abetting (Count 44);

18 U.S.C. § 1347
Health care fraud (Counts 46-80)

18 U.S.C. 1956(a)(1)(A)(i)
Money laundering (Counts 81-92)

18 U.S.C. § 1956(h)
Money laundering and conspiracy (Count 93)

2. The Superseding Indictment and a Bill of Particulars filed January 7, 2003, also provided that upon conviction of the Defendant, certain property enumerated therein and below, or equivalent substitute assets, would be subject to forfeiture to the United States pursuant to 21 U.S.C. § 853 and § 881(a)(11), 18 U.S.C. § 982(a)(1) and § 982(a)(7), and 28 U.S.C. § 2461(c).

3. On January 7, 2003, the Defendant DAVID MICHAEL WOODWARD, entered a guilty plea to Counts 1, 49 and 93 of the Superseding Indictment, charging him with drug conspiracy, health care fraud, and money laundering conspiracy. Pursuant to his Plea Agreement, the Defendant agreed to voluntarily forfeit and abandon to the United States his interest in all assets subject to forfeiture pursuant to any provision o f law, and consented to the forfeiture of such assets through civil, administrative or criminal forfeiture proceedings. The Defendant specifically stipulated that t he property in the Superseding Indictment and Bill of Particulars are subject to forfeiture to t he United States pursuant to 21 U.S.C. §§ 853 and 881 (a)(11), 18 U.S.C. § 982(a)(1), 982(a)(7) and 28 U.S.C. § 2461 as alleged by the United States.

4. Based upon the Defendant's guilty plea to violations of 21 U.S.C. § 846, 18 U.S.C. § 1347 and 18 U.S.C. § 1956(h) as charged in Counts 1, 49 and 93 of the Superseding Indictment, stipulations made by the Defendant, testimony in open court and other matters appearing in the record, the Court has determined hat the Defendant, DAVID MICHAEL WOODWARD, has in interest in the property described below, and such property is subject to forfeiture to the United States.

5. The Court has determined pursuant to Rule 32.2(b)(1) of the Federal Rules of Criminal Procedure that the Defendant DAVID MICHAEL WOODWARD, obtained and laundered a total of $5,000,000 in illegal proceeds from the drug conspiracy and health care fraud offenses for which

he has been convicted, and used such funds and his medical clinic, known as Comprehensive Care and Pain Management Center in Myrtle Beach, South Carolina, to facilitate such offenses.

6. The Court is informed that as a result of the operation of the Comprehensive Care and Pain Management Center by the Defendant, there remain various outstanding claims and accounts receivable payable to and for the benefit of the Defendant and I or Comprehensive Care and Pain Management Center. The Court finds that such finds resulting from claims or accounts receivable derived from the offenses for which the Defendant has been convicted constitute illegal proceeds of such offenses and the said property should be forfeited to the United States.

7. The Court specifically finds that the property described below (1) constitutes, is derived from, and/or is traceable to proceeds the Defendant obtained, directly or indirectly, as a result of his intentional and unlawful violation of 21 U.S.C. § 846 and was used or intended to be used in some manner or part to facilitate felony violations of Title 21, United States Code; (2) constitutes or is derived directly or Indirectly from gross proceeds traceable to health care fraud; and (3) constitutes property involved in, or is traceable to property involved in, money laundering transactions conducted as part of the money laundering conspiracy, and are, therefore, subject to forfeiture pursuant to 21 U.S.C. § 853, 18 U.S.C. § 982(a)(l) and 982(a)(7).

8. The Court farther finds that the firearms, ammunition and related materials described below constitute fire arms and ammunition as defined in 18 U.S.C. § 921(a) which were used or intended to be used to facilitate the transportation, sale, receipt, possession or concealment of controlled substances and are, therefore, subject to forfeiture pursuant to 21 U.S.C. § 8S1(a)(11) and 28 U.S.C. § 2461(c).

9. The Court has determined pursuant to Rule 32.2(b)(l) that the Government has established the requisite nexus between the said property and the offenses for which the Defendant has been convicted; therefore, the said property shall be forfeited to the United States, subject to the provisions of 21 U.S.C. § 853(n) governing third-party rights;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. The Defendant, DAVID MICHAEL WOODWARD, shall forfeit to the United States all of the Defendant's tight, title and interest in and to any property, real or personal, tangible and intangible, constituting or derived from any proceeds the Defendant obtained, directly or indirectly, as a result of his violation of 21 U.S.C. § 846, drug conspiracy, and any property used to facilitate such offense; any property constituting or derived from gross proceeds the Defendant obtained as a result of his violation oil 8 U.S.C. § 1347, health care fraud; and any property involved in money laundering transactions in violation of 18 U.SC. § 1956(h) for

which he has been convicted, up to a total aggregate sum of $5,000,000.

2. JUDGMENT IS ENTERED against the Defendant DAVID MICHAEL WOODWARD, and in favor of the United States in the amount of $5,000,000, together with appropriate costs and interest thereon at the rate provided for in 28 U.S.C. § 1961 as of the date of entry of judgment until paid in full, and the United States may satisfy such money judgment from any property of the Defendant.

IT IS FURTHER ORDERED:

1. All right, title and interest of the Defendant, DAVID MICHAEL WOOD WARD, in and to the following property is hereby forfeited to the United States, for disposition in accordance with law, subject to the provisions of 21 U.S.C. § 853(n):

A. Real Property / Proceeds of Sale:
$640,000.00 in U. S. Currency, representing sale proceeds of real property located at 7714 North Kings Highway, Myrtle Beach, SC 29572;

B. Cash:
(1) $2,680.17 in U. S. Currency transferred to the United States December 27, 2002;
(2) $499.00 U. S. Currency recovered from Comprehensive Care and Pain Management Center, 7714 North Kings Highway, Myrtle Beach, SC 29572, on June 13,2000;

(3) Any and all monies, claims, interests and accounts receivable payable to or received for the benefit of the Defendant, DAVID MICHAEL WOODWARD and / or Comprehensive Care and Pain Management Center;

C. Firearms/Amunition/Accessories:

Any and all firearms, ammunition and related materials seized on May 10, 2001, pursuant to a federal search warrant executed at Comprehensive Care and Pain Management Center, 7714 North Kings Highway, Myrtle Beach, SC, including, but not limited to, the following

(1) One (1) black rifle case containing Nornico MAC-90, serial #9208387

(2) One (1) black rifle case containing Nornico MAC-90, serial #9426393

(3) One (1) black rife case containing Ruger Sturn M-14, serial #9609342

(4) One (1) black rifle case containing Romania AK-47, 7.62 rifle, serial #51-23975-2000

(S) One (1) RomaniaAK-47, 7.62 rifle, serial #S1-28193-200

(6) One (1) Nornico 7.62 rifle, serial # 2400423

(7) One (1) Mossburg 12 gauge pump shotgun, serial #P613417

(8) One (1) tan rifle case containing a High Standard 12 gauge shotgun, no serial number found

(9) One (1) Marlin Model 99.22 long rifle, no serial number found

(10) One (1) Savage Aims Model 940012 gauge, no serial number

(11) Two (2) large boxes of assorted magazines tbt weapons

(12) Four (4) cases of Wolf band 7.62 ammo

(13) One (I) Glock 26, 9mm handgun, serial #DXHI50US

(14) Four (4) green tool boxes containing assorted ammo, 223

(15) One (1) green tool box containing Magazines for weapons

(16) One (1) box containing assorted stocks for weapons

(17) One (1) box of Federal 12 gauge shotgun shells (seven shells)

(18) One (1) box of assorted gun manuals

(19) AX-47 conversion manual

(20) Bulgarian Intrac Lower Receivers, Serial numbers: MR2675, MR2673, MR2676, MR2670, MR2669, MR2667, MR2671, MR2668, MR2672, MR2674

(21) One (1) bag of screws andbolts for lower receivers

(22) Ten (10) cases of 7.62 ammo JSC Barnaul Mac. Tool Plant 500 rounds per case

(23) One (1) plastic bag of loose 7.62 amino. Wolf bran name

2. The Defendant has consented to the entry of this Preliminary Order of Forfeiture prior to sentencing pursuant to Fed. R. Crim. P. 32.2(b)(3).

3. Upon entry, this Order becomes final as to the Defendant, DAVID MICHAEL WOOD WARD, and shall be made part of the sentence and included in the Judgment.

4. The Defendant has agreed not to seek a stay oldie forfeiture pending an appeal from conviction or order of forfeiture pursuant to Fed. R. Crim. P.32.2(d), wad has consented to the transfer of property interests to third parties or other disposition of the above-described property prior to a decision on any such appeal becoming final, and regardless of outcome, pending determination of third parties' rights and entry of a Final Order of Forfeiture. Further, the United States and the defendant have agreed that the United States will return $75,000.00 transferred to the United States on or about December 27, 2002, pursuant to the plea agreement. The government is hereby ordered to turn over the above described $75,000.00 through defendant's counsel of record, William W. Watkins.

5. Upon entry of this Order, the United States Attorney General or designee is authorized to seize the above-described forfeited property as directed by the United States Attorney's Office; to conduct proper discovery in identifying, Locating, or disposing of the property, in accordance with Fed. R.

Crim. P. 32.2(b)(3); and to commence proceedings that comply with statutes governing third party rights.

6. The United States shall publish notice of this Order and its intent to dispose of the property in such manner as the United States Attorney General may direct The United States may also, to the extent practicable, provide written notice to any person known to have an alleged interest in the said property.

7. Any person, other than the named Defendant; asserting a legal interest in the subject property may, within thirty days of the final publication of notice or receipt of notice, whichever is earlier, petition the Court for a hearing without a jury to adjudicate the validity of his alleged interest in the subject property and for an amendment of the order of forfeiture, pursuant to 21 U.S.C. § 853(n)(6) and Fed. R. Crim. P. 32.2(c). If no third party files a timely petition, this Order shall become the Final Order of Forfeiture, as provided by Fed. R. Crim. P. 32.2(c)(2).

8. Any petition filed by a third party asserting an interest in the above-described property shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the subject property, the time and circumstances of the petitioner's acquisition of the right, title or interest in such property, and additional facts supporting the petitioner's claim and the relief sought,

9. Upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture pursuant to 21 U.S.C. § 853(n), in which the interests of all petitioners will be addressed. If there are no third party petitioners claiming an interest in the said forfeited property within the time allotted by law, the within Order shall constitute a final judgment of forfeiture of all interests in favor of the United States, and convey clear title to the said property to the United Stales, and the property maybe disposed of in accordance with law.

10. The Court shall retain jurisdiction in this case for to enforce this Order and to amend it as necessary, pursuant to Fed. R. Crim. P. 32.2(e). The United States may, at any time, move pursuant to Rule 32.2 (e) to amend this Order of Forfeiture to substitute property having a value not to exceed $5,000,000 to satisfy the money judgment in whole or in part.

11. The Clerk United States District Court, shall provide ten (10) certified copies of this Order to the United States Attorneys Office for service upon interested third parties and other purposes.

IT IS SO ORDERED.

/S/ C. Weston Houck
UNITED STATES
DISTRICT JUDGE

Florence, South Carolina

September 22, 2003

ON MOTION OF:

J. STROM THURMOND, JR.
UNITED STATES ATTORNEY

/s/ WILLIAM E. DAY, II
WILLIAM E. DAY, II
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/S/ MARVIN J. CAUGHMAN
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ATTORNEYS FOR THE UNITED STATES

I CONSENT:

/S/ DAVID MICHAEL WOODWARD
DAVID MICHAEL WOODWARD
DEFENDANT

/S/ WILLIAM WHARTON WATKINS, SR.
ATTORNEY FOR THE DEFENDANT
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 28, 2007
[Entered: September 28, 2007]

No. 07-4125
4:02-cr-00673-CWH-1

UNITED STATES OF AMERICA
Plaintiff – Appellee

DAVID MICHAEL WOODWARD
Defendant – Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Michael and Judge Shedd.

For the Court,
/s/ Patricia S. Connor
Clerk